Nos. 10-9646 and 10-9647

In the Supreme Court of the United States

EVAN MILLER, PETITIONER
v.
ALABAMA

KUNTRELL JACKSON, PETITIONER
v.
RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION

ON WRITS OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA
AND
THE SUPREME COURT OF ARKANSAS

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN, EIGHTEEN (18) OTHER STATES, AND ONE (1) TERRITORY FOR RESPONDENTS

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QUESTIONS PRESENTED

Miller v. *Alabama*, No. 10-9646

1. Does the Eighth Amendment categorically bar governments from imposing life-without-parole sentences on persons who commit aggravated murder when they are 14 years old?

2. If the Eighth Amendment does not categorically bar governments from imposing life-without-parole sentences on these offenders, does it nevertheless require governments to exempt these offenders from statutes that, for the worst forms of murder, make life without parole the minimum sentence?

Jackson v. *Hobbs*, No. 10-9647

1. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old homicide offender?

2. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old homicide offender who was not the triggerman or shown to have intended the killing, but who acted with reckless indifference to human life?

3. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a mandatory life-without-parole sentence on a 14-year-old homicide offender?

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INTEREST OF *AMICI CURIAE*

As independent sovereigns, the states routinely exercise law enforcement authority, serving as the principal guardians of community safety. The vast majority of criminal prosecutions in this country occur in state court and under state sentencing laws. And, except as constrained by this Court's Eighth Amendment jurisprudence, the state legislatures generally are free to determine which punishment is most appropriate to vindicate justice, deter others from committing crime, and ensure that the perpetrator is unable to reoffend. This is the role of the states.

In determining whether a particular penalty violates the Eighth Amendment, this Court seeks to determine "whether there is a national consensus" against the practice at issue. *Graham* v. *Florida*, 130 S. Ct. 2011, 2022 (2010). The states have a manifest interest in this inquiry as it relates to the constitutionality of life-without-parole sentences for the country's most violent teenagers. Among the 50 states, 38 follow the federal practice of allowing those 14 years and older to be given life-without-parole sentences. In fact, 26 states make the punishment mandatory in at least some cases. As a result, this Court's imposition of a categorical ban would have the immediate effect of overturning federal law and the sentencing practices of more than three-quarters of the states. This Court should not casually set aside state sovereignty and sentencing authority, particularly in a controversial area that is still subject to considerable national dialogue and debate.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented in this case are narrowly framed to address the constitutionality of life-without-parole (LWOP) sentences for teenage murderers.[1] But those issues raise additional questions of much broader jurisprudential significance to the states as co-equal sovereigns: Should this Court create yet another categorical rule that removes states' sovereign authority to determine the propriety of non-capital sentences? Does such categorical rulemaking reflect appropriate separation-of-powers and democratic policy-making principles? And does international law have any role to play in determining a "national" consensus of what is cruel and unusual?

The *amici* states answer those questions and advance the following distinct points in support of the State of Alabama and the State of Arkansas:

First, this Court has recognized that administration of the criminal justice system is one of the most basic sovereign prerogatives that states retain. This Court should be reluctant to create categorical rules that eliminate entirely the states' sovereign authority to establish certain sentencing practices.

Second, judicial reluctance to circumscribe state sovereignty should be at its apex when doing so cuts short a vigorous and democratic process that already is playing out in state legislatures. This democratic principle is bigger than the fact that three-quarters of the states currently follow the federal practice of

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[1] The term "murderers" includes accomplices to murders.

allowing LWOP sentences for teenage murderers. It recognizes that this Court disrupts the democratic process and deprives society of the opportunity to reach true "consensus" when it prematurely ends valuable public debate over this moral issue. This Court should not silence one side and declare the other the winner. Rather than reflecting democratic principles, such a ruling would stultify them.

Third, in evaluating "national" consensus, *Graham* v. *Florida*, 130 S. Ct. 2011, 2022 (2010), this Court should be extraordinarily cautious before looking to international law and trends, particularly when the United States as a whole has been a conscientious objector to those trends. While international-law principles may have a more vital role to play in other areas, their legitimacy is much weaker in an Eighth Amendment analysis. To the extent *Graham* and *Roper* v. *Simmons*, 543 U.S. 551 (2005), hold otherwise, they should not be extended to teenage murderers.

Fourth, the Court should be equally cautious about extending *Graham* to categorically ban term-of-years sentences in the context of a murder offense. Murder is different than property and other nonhomicide crimes. And notwithstanding broad stereotypes about teenage immaturity and impulsiveness, some teenage murders reflect such utter depravity of will that an LWOP sentence is the only appropriate punishment.

Finally, there is no "national consensus" that would justify a judicially-imposed ban on LWOP sentences for teenage murderers. Accordingly, the Court should exercise restraint until the public debate and democratic process have had an opportunity to take their course.

ARGUMENT

I. The Court should not lightly disturb the sovereign authority that states exercise over their discrete criminal-justice systems.

This Court frequently has recognized that "administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain." *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009) (citing *Patterson* v. *New York*, 432 U.S. 197, 201 (1977)). As a result, "preventing and dealing with crime is much more the business of the States than it is of the Federal Government," and this Court will "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201 (citing *Irvine* v. *California*, 347 U.S. 128, 134 (1954)).

On its face, this Court's insistence on a "national consensus" as a prerequisite to categorically prohibiting a particular sentencing practice, *Graham*, 130 S. Ct. at 2022, appears to embody the same sort of heightened concern for state sovereignty this Court historically has acknowledged when evaluating the constitutionality of state criminal-justice practices. But the actual *Graham* decision was less so.

The *Graham* opinion began by acknowledging that 37 states and the federal government had laws on their books that allowed LWOP sentences for nonhomicide teenage offenders in at least some circumstances. But the opinion's analysis then rejected the state-sovereign prerogative and judicially repealed those laws, perhaps failing to fully account for state sovereignty.

First, the *Graham* opinion examined actual sentencing practices in the various states and concluded that the relatively sparse use of LWOP sentences for nonhomicide teenage offenders revealed a "consensus" against the practice. 130 S. Ct. at 2026–27. There is another possible conclusion to draw from this fact. The then-existing state practice allowed those individuals closest to the facts of each unique case—prosecutors and judges—to determine the propriety of an LWOP sentence. The fact that a low number of teenage, nonhomicide crimes actually resulted in LWOP sentences did not necessarily demonstrate a disdain for such a practice. More likely, it proved that the system was working: prosecutors sought the highest, non-capital punishment available only in the most severe cases, when the sentence was justified. Proper deference to state sovereignty includes honoring this state and prosecutorial restraint.

Second, the *Graham* opinion recognized that choosing among the different goals of criminal punishment "is within a legislature's discretion." 130 S. Ct. at 2028 (citing *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991)). That recognition has both separation-of-powers and federalism components. At the time *Graham* was decided, 37 states had determined that LWOP sentences for nonhomicide teenage offenders satisfied the penal goals of retribution, deterrence, incapacitation, and rehabilitation. But the opinion essentially suggests that the legislatures abused their discretion in making that determination. *Id*. at 2028–30. As Respondents explain in their merits briefs, Alabama Br. 48–55, Arkansas Br. 25–36, these penal goals cut much differently in the context of teenage murderers, because there is a bright line "between

homicide and other serious violent offenses against the individual." *Graham*, 130 S. Ct. at 2027. Nonetheless, federalism principles suggest that state legislative judgments be accorded additional respect.

II. The Court should not cut short the democratic process that already is playing out in state capitals regarding the propriety of LWOP sentences for teenager murderers.

Wholly aside from protecting state sovereignty, this Court should be cautious, not precipitous, before recognizing a new constitutional right that wipes away existing state law. In other words, regardless of the Court's view of the propriety of LWOP sentences for teenage murderers, there are societal costs for moving too quickly.

Take the Court's decision in *Roper*. Now that the Court has definitively held that the juvenile death penalty always is unconstitutional, there will be no more public, democratic debate about the propriety of such a sentence. This will be true even if there is a sudden change in crime patterns and citizens believe that the death sentence would be appropriate. Even those who would have supported the death penalty will stop debating the issue in the statehouse and court of public opinion, because the Court has foreclosed any ability to effect change at the legislative level.

Depriving American citizens of the opportunity to have a public debate comes at a high cost. For example, if this Court holds that LWOP sentences for teenage murderers is unconstitutional, society will not have the opportunity to reach this Court's understanding of "justice" through public exchanges of information and

discussion. And short-circuiting the state legislative process before society has reached a true "consensus" is damaging, both to our democratic form of government and to this Court's institutional credibility.

It is possible to see that debate happening right now. States continue to reevaluate their sentencing schemes for teenage murderers, sometimes reducing punishment, but more often maintaining or enhancing sentence length. If societal views coalesce eventually around one side or the other of this issue, the democratic process—not the courts—can and will respond to that popular sentiment. Particularly when interpreting a constitutional amendment that is "consensus" based, it is appropriate to allow public debate and the marketplace of ideas to play their course.[2] A premature decision ossifies the debate, leaving those who hold the "disfavored" views on the matter frozen in place and effectively silenced.

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[2] This public discourse is certainly present in Michigan. Long ago, Michigan was the first English-speaking government in the world to abolish totally the death penalty. But Michigan's citizens, ravaged by juvenile violent crime, enhanced the sentence length for teenage murderers. An overly aggressive Eighth Amendment jurisprudence inhibits Michigan's ability to innovate and adjust to the changing needs of its citizens.

III. The Court should be cautious before using international law to shed light on "national" consensus.

Exactly 200 years ago, Chief Justice John Marshall observed that "All exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 136 (1812). Yet *Roper* and *Graham* both looked to the legal systems of other nations as evidence of what should be considered "cruel and unusual punishment." Regardless of the validity of using international law to understand other provisions of the U.S. Constitution, its use should be most circumscribed when discerning a "*national* consensus" as to the cruelness or unusualness of a state's sovereign sentencing practice. Indeed, this Court has never held that international law has that role. It has only said that international practice can confirm the Court's independent judgment about the cruel-and-unusual nature of a practice.[3]

The divergence between U.S. law and that of the rest of the world reaches far beyond the punishment of teenagers. As but one of many examples, a German

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[3] Petitioners are wrong to assert that the United States is in "potential violation" of its obligations under international treaties. (Jackson Br. 51 n.66.) See Stimson & Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens* 46–54 (Aug. 2009) (explaining that the United States is not a party to the Convention on the Rights of the Child, and that the International Covenant on Civil and Political Rights and the Convention Against Torture do not prohibit juvenile LWOP in the United States).

trial court recently convicted one of the 9/11 co-conspirators on over 3000 counts of accessory to murder. His sentence was 15 years, the maximum allowed under German law, which was reduced to only 7 years after an appeal and retrial.[4] Such a result for one of the most notorious acts of murder in the history of the United States would have sparked outrage here. There is no question that such a crime would have resulted in the death penalty in our nation. The result represents a fundamental disparity in notions of appropriate punishment.

A. Considering foreign policies distracts from the relevant Eighth Amendment considerations

The definition of "cruel and unusual punishment" is understood to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). The Court has therefore developed a two-prong test that considers both an objective evaluation of the national consensus and a subjective judicial consideration of whether the punishment is in accord with "the dignity of man." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976).

In this second prong, the Court is left to its own devices in deciding whether a punishment is excessive as the "maturing society" understands it. *Trop*, 356 U.S. at 101. The Court undoubtedly has broad latitude in coming to a conclusion on this subjective element.

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[4] Craig Whitlock, Friend of 9/11 Hijackers Convicted in Germany, Wash. Post, Aug. 20, 2005, at A12.

But foreign sources tell the Court little about whether a punishment exceeds what is acceptable for the United States penal system. Among other things, other nations, with different legal and moral traditions, may have chosen different penal goals.

Determining whether a teenage murderer is deserving of a particular term-of-years punishment is a highly context-specific process that does not necessarily span across legal systems. Younghjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. Pa. L. Rev. 63, 81 (Nov. 2007). There are multiple reasons why a punishment might be deemed "deserved" in one country but not in another. For instance, using the retributive theory of punishment, a certain crime may be considered a more serious violation in one country than another, requiring a greater payment to society. *Id*. at 80.

On the other hand, using the deterrence theory of punishment, the punishments might look different because one country has an inflated scale of imprisonment compared to another, requiring a comparatively greater punishment to effectively deter. *Ibid*. Since statistics alone cannot explain the penal theory behind a punishment or its harshness relative to other penalties, comparing American punishments to generalized statistics of foreign punishments does nothing to demonstrate whether or not a certain punishment is excessive. After all, this analysis asks whether separating teenage murderers from society permanently is justified to protect the community or vindicate justice based on the gravity of murder, the most serious offense under law.

Examining foreign judgments also runs the risk of supplanting the actually relevant data gathered in the national consensus analysis. It was for this reason that Chief Justice Rehnquist rejected the recourse to foreign sovereigns entirely: "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant." *Atkins* v. *Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (emphasis added).

B. Foreign governments have different policies and agendas that cannot be captured in sentencing data.

Academic articles often imply that foreign law is a unified whole that can be used to interpret the morality of United States sentencing practices. But by the very nature of their history and cultures, other nations have laws that reflect different understandings of justice, even on continents considered most similar to our own in morals and culture.

For instance, American law's view of individual rights is grounded in popular democracy, sovereignty, and written constitutions. In stark contrast, European constitutionalism and the international notion of human rights are based on "principles that derive their authority from sources outside of or prior to national democratic processes." Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 1999 (2004). Since foreign governments are not guaranteed to value the same rights and privileges as the United States, they cannot be counted on as providing examples of the "evolving standards of decency"

necessary for Eighth Amendment analysis. *Trop*, 356 U.S. at 101.

If we do choose to look to foreign nations as examples for our system of punishment, there is the further problem of which nations to choose. But when we stratify foreign countries by maximum allowable juvenile sentence, it is clear that there is very little international consensus on how much punishment is too much. Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sentencing Rptr., No. 1 at 39–48 (Oct. 2010) (citing Frieder Dünkel & Barbara Stańdo-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty – Comparative Aspects*, *Juvenile Justice Systems in Europe – Current Situation and Reform Developments* 1772 (2010)). In 2010, maximum youth sentences in Europe ranged from life imprisonment with the possibility of parole in the Netherlands, Scotland, and England to 20 years imprisonment in Greece and Romania, to just three years imprisonment in Portugal. *Id*. When the European community differs so greatly in its concept of what length of sentence is excessive, American courts are forced to cherry-pick which nations most represent American values and answer the subjective question of whether the United States is more like the Netherlands or more like Portugal.

The international test is even more problematic because American ideals on punishment sometimes evolve in the opposite direction of those in foreign nations. In recent years, several nations that once allowed LWOP sentences have outlawed them. Connie De La Vega & Michelle Leighton, *Sentencing our*

Children to Die in Prison: Global Law and Practice, 42 U.S.F. L. Rev. 983, 996–1004 (2008). Meanwhile, in the United States, state legislatures consistently *increased* the severity of punishments for teenage offenders over the past 20 years. *Graham*, 130 S. Ct. at 2050 (Thomas, J. dissenting). During that time period, "legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems *more* punitive." *Id*., quoting 1999 DOJ National Report 89 (emphasis added). If state legislatures have unequivocally expressed their preference for a more punitive sentencing scheme for teenage offenders, it makes little sense to seek guidance from foreign legal systems that not do not share our history or institutions and consistently have moved in the opposite direction on this issue.

IV. The Court should decline to use a categorical ban on a term-of-years sentence involving the crime of murder.

Graham represented the first decision in the Court's history to declare "an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone." *Graham*, 130 S. Ct. at 1046 (Thomas, J. dissenting). Even in the context of nonhomicide teenage offenders, such an approach did not allow for states to conclude that the most reprehensible teenage offenders might warrant an LWOP sentence. See *id*. at 2041 (Roberts, C.J., concurring in the result) ("[W]hat about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? Or

Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son?"). Categorical sentencing bans eliminate the possibility that a particular sentence, such as LWOP, *ever* will be appropriate. Such a rule "is as unnecessary as it is unwise." *Id*.

The facts of countless teenage murderers demonstrate, in graphic fashion, why this Court should eschew the categorical approach in favor of a more nuanced, case-by-case determination. Despite the sociological evidence that teenagers, as a whole, can be impetuous and subject to peer pressure, it cannot be disputed that individual cases show a perversity of will, a moral culpability, and a propensity for recidivism that a categorical rule will never take into account. "Those under 18 years old may as a general matter have 'diminished' culpability relative to adults who commit the same crimes, but that does not mean that their culpability is always insufficient to justify a life sentence." *Graham*, 130 S. Ct. at 2041–42 (Roberts, C.J., concurring in part). Given that "specific cases are illustrative," *Graham*, 130 S. Ct. at 2031, consider the following examples, just from a single Michigan county:

- 14-year-old Calvin Hirsch and 15-year-old Donyelle Black pulled Wanda Sutherland, 39, from her car at gunpoint. They raped, robbed, and beat her, then shot her in the head and killed her, ignoring her many pleas for mercy. Black received a sentence of LWOP, but Hirsch pleaded guilty and was sentenced as a juvenile, serving only 5 years and released at 19. At age 23, he shot and killed Dora Lisa Shaw over a

$13 drug debt. This murder would have been averted had the LWOP sentence Hirsch received at 23 been imposed at age 14.[5]

- Barbara Hernandez, then 16, watched as her 20-year-old boyfriend slit a man's throat, then stabbed him 25 times so the couple could steal his car.[6]

- John Polick, 16-years-old, shined the flashlight on a 67-year-old woman while his older brother brutally beat her to death so the brothers could steal a television.[7]

- 15-year-old Christopher Dankovich stabbed his mother 111 times in their Rochester Hills home.[8]

- 17-year-old Michael Kvam raped and killed a woman, a teenager, and a little girl in Rochester Hills. The brutality of the crimes shook a local judge enough to change his stance on the death penalty.[9]

Finally, consider the case of Maurice Clemmons, a *former* teenage lifer in Arkansas. Clemmons was sentenced to 95 years without parole as a 17-year-old

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[5] Stephen Frye, *Human Rights: Children facing life*, Oakland Press (Nov. 13, 2005), available at http:www.axisoflogic.com /artman/publish/Article_19945.shtml.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

for robbery, burglary, theft, and bringing a gun to school. His sentence was commuted by the then-Arkansas Governor, "because of his age." At 2:45 a.m., four police officers were shot and killed in cold blood in a Seattle coffee shop.[10] These four officers would have been saved if the Arkansas Governor had preserved the LWOP sentence Clemmons received.

These are crimes committed by coldhearted murderers, not "children." To say that these brutal offenders are not culpable or not capable of recidivism is to ignore reality. See Lerner, Craig S., *Juvenile Criminal Responsibility: Can Malic Supply the Want of Years?*, 86 TULANE L. REV. 309 (2011). And downplaying teenage murder also ignores the plight of victims and their heartbroken families.

In sum, murder is different, as this Court tacitly acknowledged in upholding an LWOP sentence for a teenage murderer in *Roper*. Accordingly, the Court should limit *Graham*'s application to non-murder cases and otherwise restore harmony with the Court's pre-*Graham* appreciation of the special place of the death penalty in its Eighth Amendment jurisprudence. Such an approach also would align this Court's Eighth Amendment precedent with its recent cases in other juvenile-justice areas that reject categorical rules in favor of balancing tests that take many factors—including the defendant's age—under consideration. E.g., *J.D.B.* v. *North Carolina*, 131 S. Ct. 2394, 2408 (2011) (requiring a case-by-case analysis taking the

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[10] CNN, *Police, Suspect dead, had slain cop's gun* (Dec. 1, 2009), available at http://www.cnn.com/2009/CRIME/12/01/Washington.suspect.shot/; Nat'l Organization of Victims of Juvenile Lifers, *Dangerous Early Release*, available at http://www.teenkillers.org.

defendant's age into account in the *Miranda* custody analysis, rather than a "more easily administered" bright-line rule).

There is no reason to impose a categorical ban and overturn 38 state sentencing laws simply because it is a teenager, rather than an adult, who has committed the most heinous of crimes: the taking of a human life.

V. The Court should not categorically prohibit LWOP sentences for teenage murderers.

A. There is no "national consensus" regarding sentencing for teenage murderers.

Arkansas and Alabama correctly argue that there is no "national consensus" in favor of abolishing LWOP sentences for teenage murderers. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312 (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989)). And current state legislation (and its recent history) do not justify a categorical ban.

The notion of trying juveniles in adult court was rare until a steep rise in violent youth crime in the mid-1980s triggered a move toward harsher penalties and made adult sentences available to juveniles who commit the same crimes. Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, 14 (2005), http://www.hrw.org/en/node/11578/section/4 (last visited February 5, 2012). "By 1997, all states but three (Nebraska, New York, and Vermont) had

changed their laws to make it easier and more likely that child offenders would stand trial and be sentenced in adult criminal courts." *Id*.

Of the 44 states that now allow LWOP for homicides, 36 do so for offenders who commit their crimes before the age of 15. *Id*. Petitioners note that there are approximately 79 offenders serving LWOP in the United States for offenses committed at the age of 13 or 14. (Jackson Pet'r Br. at 47–48.) That number is almost certainly understated.[11]

Moreover, the number of under-15 teenage murderers serving LWOP sentences cannot logically be attributed to a consensus against such sentences, as Petitioners argue. Rather, the numbers reflect how few 13- and 14-year-olds commit the types of barbaric murder for which the states (and their prosecutors) have reserved the second-most-severe criminal punishment. States that allow but do not impose LWOP for teenage murderers—or only do so selectively in the most egregious cases—should not be treated as if they have expressed the view that the sentence is inappropriate.

In determining whether a particular sentencing practice is categorically "cruel and unusual" under the Eighth Amendment, the Court also considers "the

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[11] For example, Michigan understands that Miller's counsel has informed Alabama that its current estimate includes five such offenders in Michigan. But the Michigan Department of Corrections has informed the Attorney General's office that the correct number is actually seven. There is thus quite possibly substantial imprecision in the numbers Miller has offered to the Court.

culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 130 S. Ct at 2026 (internal citations omitted).

Petitioners argue that "every factor which the Court considered crucial for the results in *Roper* and *Graham* equally or more strongly compels the invalidation" of LWOP sentences for young teens who commit murder. Jackson Br. 8. Not so. Generalizations about teenagers are always dangerous. To suggest that there is not a single teenage murderer whose culpability, depravity of will, and risk of recidivism justifies an LWOP sentence defies credibility. As described above, there are certain teenage offenders whose horrific crimes warrant an LWOP sentence.

Finally, LWOP sentences for 14-year-old murderers do serve legitimate penological goals. An LWOP sentence is appropriate retribution for one who takes a human life, often in the most vicious, brutal, and inhumane ways possible, as the examples above demonstrate. "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim," such a sentence clearly is not disproportionate to a crime that causes such severe, irreparable harm to the victim, his or her family, and society. *Roper*, 543 U.S. at 571.

An LWOP sentence is also appropriate for deterrence. Even if such a sentence deters teenage murders "in a few cases," *Graham*, 130 S. Ct. at 2029, that means lives saved.

As for incapacitation, the *Graham* Court expressly recognized that, while it "may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide." *Graham*, 130 S. Ct. at 2029. The Court continued by recognizing the potential for a "rare juvenile offender whose crime reflects irreparable corruption." *Id*. (quoting *Roper*, 543 U.S. at 572). Teenage murders provide precisely the context that is justified by the legitimate penological goal of incapacitation. The Court should not foreclose courts from imposing LWOP sentences for those rare offenders whose crimes do reflect "irreparable corruption."

In sum, LWOP sentences for juvenile homicide offenders are justified by at least three legitimate penological goals—retribution, deterrence, and incapacitation. As the Court reiterated in 2010, "Choosing among them is within a legislature's discretion." *Graham*, 130 S. Ct. at 2028 (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991)). There is no basis to disturb the people's wisdom in exercising that discretion in 38 states and at the national level.

B. Petitioners' sentences are not grossly disproportionate to their offenses.

With the singular exception of *Graham*, the Court has used a case-by-case balancing test to analyze non-capital cases in evaluating Eighth Amendment challenges. The Court begins with a threshold inquiry "comparing the gravity of the offense and the severity of the sentence" to determine whether the punishment

is "grossly disproportionate for a particular defendant's crime." *Graham*, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005) (opinion of Kennedy, J.)). In the "rare case" in which this threshold inquiry indicates "gross disproportionality," the court next "compare[s] the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.*

An LWOP sentence is undeniably a severe punishment to impose on any defendant, let alone a 14-year-old. But it is not disproportionately so with regard to Petitioners' offenses.

Petitioner Evan Miller and his 16-year-old co-defendant went to Miller's 52-year-old neighbor Cole Cannon's trailer with a plan to steal money from him. When an altercation ensued, Miller "climbed onto Cannon and began hitting him in the face with his fists," "picked up [a baseball] bat . . . and continued to attack Cannon by striking him with it repeatedly." Miller J.A. 133. He then told him, "I am God, I've come to take your life." After leaving briefly, the two returned to the trailer of their incapacitated victim and set several fires "to cover up the evidence." *Id.* Firefighters discovered Cannon's body in the burning trailer. Miller J.A. 134.

As the Wisconsin Supreme Court recognized in the post-*Graham* case of *State* v. *Ninham*, 797 N.W.2d 451, 475 (Wis. 2011), "[that the defendant] was just 14 years old at the time of the offense and suffered an indisputably difficult childhood does not . . . automatically remove his [LWOP] punishment out of the realm of the proportionate."

The case of Kuntrell Jackson presents a different situation, though one that remains similarly within the "realm of the proportionate." *Ninham*, 797 N.W.2d at 475. Jackson, aware that one of his two accomplices, Derrick Shields, "was carrying a sawed-off .410 gauge shotgun in his coat sleeve," proceeded with a plan to rob a neighborhood video store. When store clerk Laurie Troup repeatedly insisted she did not have any money and "mentioned something about calling the police, Shields shot her in the face," killing her. Jackson J.A. 84–85.

Jackson was convicted of capital murder and sentenced to LWOP after the trial court found that Troup's death occurred "under circumstances manifesting an extreme indifference to the value of human life" in the course of the aggravated robbery in which Jackson was involved. Jackson J.A. 85. While felony murder may present somewhat less dramatic scenarios than those in which the defendant is the "triggerman," an overwhelming majority of 46 states hold all co-conspirators liable for murder if a death results during the commission or attempted commission of a felony. *See* John Gramlich, *Should murder accomplices face execution?* (2008), http://www.stateline.org/live/details/story?contentId=333117.

It is not unreasonable to conclude that a person like Evan Miller, who can tell his victim—against whom he has no vendetta—that "I am God and I have come to take your life" while beating him with a baseball bat, poses the kind of risk that will never lessen with time. He is uniquely dangerous. And his crime is one that cries out for justice. The conclusion

that he has to forfeit his right to live in the community for the rest of his life is neither cruel nor unusual.

The same is true for Kuntrell Jackson. He assisted Derrick Shields in a robbery during which Shields coldly executed the store clerk, shooting her in the face with a shotgun, while she pleaded that she had no money. These are the gravest offenses against justice, reflecting an incorrigible indifference to human life. The State of Arkansas acts within its right by requiring that the perpetrators lose their right to live in society. Again, this is neither cruel nor unusual.

Miller and Jackson's crimes were pre-planned, brutal, and senseless. Their victims lost their lives, and the victims' families are forever changed. Miller and Jackson continue their lives in prison. The punishment of permanently removing them from society is not "grossly disproportionate," despite any lessened culpability the Court may attribute to them due to their age. Not being such "rare case[s]" in which this threshold inquiry indicates "gross disproportionality," the court need not proceed to the second step of the balancing analysis. *Graham*, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.)).

CONCLUSION

The judgments of the courts of appeal should be affirmed.

Respectfully submitted,

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